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Suggestions for Title Examination*

The first duty of the title examiner is to ascertain the chain of title, the line of ownership of the land from the present owner back to the Commonwealth of Pennsylvania. The chain of title is "as strong as its weakest link" and a good and marketable title[1] does not exist if one or more of the conveyances has been defective. The chain of title is ascertained by an examination of the consecutive conveyances by which the ownership of the land has passed from the Commonwealth of Pennsylvania, through the successive owners, to the present holder of the title. The examiner's knowledge in the first instance is of the present ownership only and his search, therefore, begins with the conveyance to the present owner and ends with that from the Commonwealth. In many instances the failure of

*This article is an elaboration of the notes of a lecture before the Middler Class of Dickinson School of Law by Addison M. Bowman, of the Cumberland County Bar. Valuable hints to the student are contained in "How to make abstracts of title and searches," by Edw. M. Foye, of the Erie Bar, 1896; Fallon on Conveyancing in Pennsylvania; appendix to Vol. 2, Dunlop's Book of Forms, 1912.

[1]Herman vs. Somers, 158 Pa. 424.

former owners to record their deeds, or the passage of title by descent at a time so remote that inquiry does not reveal the former owners, prevents the examiner's continuing his search to the Commonwealth. As will be noted hereafter the search must be as complete as possible;[2] and if the title can then be shown on the records for a period of time of such length[3] that the statute of limitations will bar any adverse claims, the chain of title may be considered satisfactory.

The examiner should write a brief synopsis of each conveyance or transfer of title, noting the presence or absence of the requisites of a valid transfer as well as a description of the land sufficient to identify it. The order of conveyances in these notes will necessarily be the reverse, in point of time, of the order in which the transfers of title actually took place, the conveyance out of the Commonwealth being the last to appear on the notes.[4] These notes should be preserved and indexed by the attorney, both as to owner and locality of the land, thereby saving a duplication of work when a subsequent examination of another tract traces the title into an ownership common to both.

In Pennsylvania title to real estate is transferred by grant or deed, will, descent under the Intestate Laws, prescription, accretion and patent out of the Commonwealth.[5] The examiner must be familiar with the elements of a valid conveyance in each of these classes before attempting the actual investigation of the records.

[2]See post, search for mortgages. Note 47.

[3]Westfall vs. Washlagle, 200 Pa. 181. By act of Apr. 27, 1855. P. L. 369. Thirty years continuous possession raises presumption of title out of the commonwealth; by Act of Apr. 14, 1851, P. L. 615, no right of action exists for recovery of possession after the expiration of forty years after the right of action accrues. Coble vs. Coble, 146 Pa. 451; by Act of Apr. 22, 1856, P. L. 532, no action for recovery of land may be brought after the expiration of thirty years from date right of action accrued.

[4]See abstract, post.

[5]Tiffany on Real Property, page 828, et seq.

GRANT[6]. In the office for recording of deeds[7] will be found the record of all grants or deeds. A careful examination of the record of the instrument will show (1) the names of the parties—grantor and grantee—or a description from which their identity may be ascertained[7a]; (2) the date of the deed; (3) the date of rceording; (4) the place of recording—record book and page; (5) the consideration; (6) the quantity or nature of the estate conveyed; (7) the description of the land conveyed; (8) covenants and restrictions running with the land, if any; (9) warranty, if any; (10) signature and seal of the grantor; (11) certificate of acknowledgment by the grantor or probate by witnesses.

DATE. The presence of a date in a deed is not essential to its validity. [8] It is the delivery of the deed which makes it effective and this is a matter which does not necessarily appear on the record. The acknowledgment and recording of the deed are evidence of delivery.[9] Delivery must be made during the ownership of the grantor in the deed and the existence of this ownership depends not only upon his having previously acquired title but upon his not having conveyed it to another prior to the conveyance to the present grantee. The ascertaining of this latter fact is what is usually denominated the "search for adverse conveyances."

[6]Revenue stamps on deeds have been required by Act of Congress as follows: From Sept. 1, 1862, to Oct. 1, 1872, and from July 1, 1898 to July 1, 1901, at rate of fifty cents for each $500, of consideration; from July 1, 1901, to July 1, 1902 at rate of twenty-five cents for each $500 over $3,000; from Dec. 1, 1914, to Sept. 9, 1916, and from Dec. 1, 1917, to the present time, at the rate of fifty cents for each $500 of consideration. With the exception of the first period above mentioned conveyances for the consideration of one hundred dollars or less have been exempt from the tax.

[7]Established by act of May 28, 1715, 1. Sm. L. 94.

[7a]Friday vs Liebendorfer, 242 Pa. 458; Huss vs. Stephens, 51 Pa. 282.

[8]Geiss vs. Odenheimer, 4 Yeatts 278.

[9]Clymer vs. Groff, 220 Pa. 580; Cooper vs. Duval, 10 D. R. 475. See Boardmen vs. Dean, 34 Pa. 352.

CONSIDERATION. The actual consideration for the conveyance need not be set out.[10] It is sufficient to recite a nominal consideration and in the absence of such a recital the actual consideration may be shown.[11]

QUANTITY OR NATURE OF THE ESTATE CONVEYED. In the common law form of deed the granting clause, or words of conveyance, and the habendum together designate the quantity and nature of the estate granted—whether in fee simple, for life, in trust, etc. The habendum may enlarge but cannot limit the estate created by the granting clause.[12] Prior to the passage of the Act of April 1, 1909, P. L. 91, a fee simple estate was created only when the conveyance was to the grantee and his "heirs," the word heirs appearing either in the granting clause or in the habendum.[13] Under the Act of 1909, supra, the words "grant and convey", or either one, pass a fee simple estate unless a lesser estate is specifically named.

DESCRIPTION. A description that is sufficiently clear to identify the property conveyed is essential. A mere reference to another insrument that identifies the property is sufficient.[14] A draft of the tract should be made by the examiner by the use of rule and protractor or otherwise, to aid in identifying the property in prior conveyances and in the search for adverse conveyances.

COVENANTS AND RESTRICTIONS. A careful reading of the entire instrument will disclose restrictions upon the right of the grantee to use the land, charges on the land and reservations of easements in the grantor or others.[16]

[10]Lawrence vs. Lawrence, 105 Pa. 335. A voluntary deed is valid.
Lancaster vs. Dolan, 1 Rawle, 231.
[11]Sprague vs. Woods, 4 W. & S. 192.
[12]See Tyler vs. Moore, 42 Pa. 374; Berridge vs. Glassey, 112 Pa. 442.
[13]Tiffany on Real Property, 45.
[14]Equitable Gas Co., vs. Limegrover, 54 Pa. Sup. 250.
[16]Act of Nov. 27, 1779, 3 P. & L. Digest, 5921, remitted all ground rents due the Commonwealth and the Penn heirs reserved in deeds prior thereto.

WARRANTY. The warranty may be general—against lawful claims of any person—or special—against the grantor and persons claiming through him. Under the Act of 1909, supra, the form of warranty has been much simplified by the use of the words "warrants generally" or "warrants specially" instead of the old form. Persons acting in a representative capacity or under order of court usually warrant only against incumbrances placed on the property by themselves.

SIGNING. The deed must be signed by the grantor.[17] Signing by mark in the presence of subscribing witnesses is sufficient even though the grantor is able to write.[18] The seal of the grantor is essential.

WITNESSES. Attestation by subscribing witnesses is not necessary if the deed is properly acknowledged. If not acknowledged the deed may be probated by two subscribing witnesses before a Justice of the Peace.[19] When the grantor and subscribing witnesses cannot be produced, or where there were no subscribing witnesses, the signature of the grantor may be proved before a Judge of the Court of Common Pleas.[20]

ACKNOWLEDGMENT[21]. Acknowledgment or probate of the execution of a deed is a condition precedent to recording. Although the Recorder will frequently record any paper presented to him, a deed recorded but not acknowledged or with a defective acknowledgment, is notice to no one.[22] A certificate

[17]Miller vs. Ruble, 107 Pa. 395. But where record of deed showed that the grantor had acknowledged the deed but failed to show his signature, it was held that the certificate of the acknowledgment by the grantor raised the presumption that the grantor has actually signed the deed. Carr vs. Frick Coal Co., 170 Pa. 62.

[18]Tiffany on Real Property, Sec. 402.

[19]Act of May 28, 1815, P. L. 94.

[20]Acts of March 18, 1775, 1 Sm. L. 442; May 25, 1878, P. L. 155.

[21]See notes 19 and 20. "Acknowledgment and Probate as Evidence of Execution of Deeds," 18 Dickinson Law Review, 221.

[22]Lancaster vs. Flowers, 198 Pa. 614 (621.)
Myers vs. Boyd, 96 Pa. 427.

of acknowledgment bearing a date subsequent to the date of the deed is valid.[23] An acknowledgment actually taken before the execution of the deed is invalid. But the officer taking the acknowledgment is presumed to have performed his duty and a contradiction in the date of the deed and certificate of acknowledgment will be presumed to be a clerical error in the date of the deed.[24]

A valid certificate of acknowledgment should show: (1) the date of acknowledgment;[25] (2) that the grantor acknowledged the conveyance as and for his act and deed;[26] (3) that it was taken before an officer authorized by law to take acknowledgments;[27] (4) the signature of the officer; (5) the official seal of the officer;[28] (6) the date of the expiration of the officers commission;[29] (7) the place of taking the acknowledgment[30]. The acknowledgment by an attorney in fact should be "in the name" and "as the act and deed of his constituent"[31]. The Act of April 4, 1901, P. L. 87, abolished the requirement that a married woman's acknowledgment be taken separate and apart from her husband.

The acknowledgment may be taken within the State by a notary public,[32] Justice of the Peace while acting within his own County as to deeds to be recorded anywhere within the state,[33] United States Commission

[23]Fisher vs. Butcher, 19 Ohio. 406.
[24]Coover vs. Manaway, 115 Pa. 338; Fisher vs. Butcher, supra.
[25]Myers vs. Boyd, supra.
[26]Myers vs. Boyd, supra.
[27]Uhler vs. Hutchinson, 23 Pa. 110. Angier vs. Schieflin, 72 Pa. 106.
[28]Bowser vs. Kramer, 56 Pa. 132. (142.)
[29]Act of Apr. 4, 1901, P. L. 70.
[30]Ross & Co., & Elsbree's Appeal, 106 Pa. 82. Certificate of acknowledgment of Justice of the Peace is presumed to be that of a Justice of a County of Pennsylvania where the place of taking the same, etc., does not appear in the certificate.
[31]Peters vs. Condron, 2 S. & R. 80. By Act of May 25, 1897, P. L. 81, prior conveyances by attorneys in fact in violation of this rule were validated.
[32]Davey vs. Rufel, 162 Pa. 443. Act of May 25, 1893, P. L. 136—a Notary Public may take an acknowledgment anywhere within the State.
[33]Share vs. Anderson, 7 S. & R. 43.

er,[34] Recorder of Deeds,[35] Judges of the Court of Common Pleas[36]. It may be taken without the State by a notary public,[37] Commissioner of Deeds for Pennsylvania,[38] Judges of Courts of Record,[39] United States Commercial Agents,[40] Ambassadors[41] and Consuls.[42]

LOCATING THE RECORD OF THE GRANT. If the name of the predecessor in title is known, refer to the "Grantor" index of deeds in the Recorder's Office and examine all deeds of such owner to the present owner until the deed conveying the land in question is found. If the name of the former owner is not known, refer to the "Grantee" index in this office under the name of the present owner and examine all conveyances into him until the deed conveying the land in question is found. In case this does not produce the deed examine the "Grantee" Index to Sheriffs' and Treasurer's deeds in the Recorder's or Prothonotary's Office and the "Grantee" index of Miscellaneous Records. If no record of title by grant can be found, inquiry among persons familiar with the property may disclose the name of the former owner and whether the title passed by will or descent. Fortunately most deeds contain a recital of at least the next preceeding conveyance so that such an exhaustive search is not ordinarily required.[43]

WILL. Where the conveyance of land to an owner in the chain of title is by will, this instrument as well as the index in the office of the Register of Wills must be examined. A careful reading of the will with verbatim notes of all portions which in any way affect the title to the land in question and notation of the date of the will, the date of the death of the testator, the date of issuance

[34]Act of March 4, 1901, P. L. 300.
[35]Act of Apr. 6, 1859, P. L. 383.
[36]Act of Apr. 13, 1791, 3 Sm. L. 28; 2 P. & L. 2749.
[37]Act of Apr. 22, 1863, P. L. 548.
[38]Act of Apr. 14, 1828.
[39]Act of Mar. 23, 1919, 2 P. & L. 2754.
[40]Act of June 1, 1891, P. L. 159.
[41]Act of Apr. 2, 1859, P. L. 352.
[42]Act of Jan. 6, 1827, P. L. 9. See Pa. St. 1920, Sec 8704 et seq.
[43]See "Recitals in Deeds as Evidence," 20 Dickinson Law Review, 195.

of Letters Testamentary or of Administration c. t. a., will enable the examiner to consult the law and give a sound opinion on the title. Since the Act of 1917[44] inheritance taxes are payable by direct as well as collateral heirs, the record of the appraisement and payment being in the Registers Office. This tax is a lien for a period of five years from the death of the testator.

DESCENT. Title to the land may have been acquired by virtue of the intestate laws of the Common wealth.[45] In case of descent to a number of heirs partition proceedings may have been instituted in the Common Pleas or the Orphans' Court.[46] In case of partition proceedings a careful examination of all papers will disclose facts giving the Court jurisdiction. In such cases consult the various acts of Assembly. Great care must be taken in case of partition in the Orphans' Court to ascertain that all recognizances and charges have been satisfied or released by the parties entitled. Releases of dower and similar charges are usually recorded in the "Miscellaneous Record Books" or on the margin of the record of the charge. A judicial sale will discharge such incumbrances;[47] mere lapse of time will not.

PRESCRIPTION Title to real estate may be acquired by actual, continued, visible, notorious, distinct and hostile or adverse possession for twenty one years,[48] Such title, arising by acts of the parties and not evidenced by writing will not be disclosed by the examination of the records in the Recorder's Office.

[44]Act of Apr. 1, 1917, P. L. 832; Act of June 2, 1919, P. L 521.

[45]Intestate Act of 1917, P. L. 429.

[46]Orphans Court Partition Act of 1917, P. L. 337.

[47]23 C. J., notes 64-67, By Act of Apr. 27, 1855, P. L. 369, failure to make a demand for payment of a legacy charged on land for a period of 20 years after it becomes due will bar a recovery thereof. Meek's Estate 161 Pa. 360.

[48]Llewellyn vs. Buechly, 198 Pa. 642. Act of Apr. 15, 1903, P. L. 212, provides that any one in possession claiming title may obtain a rule on any one out of possession asserting a claim thereon to bring an action of ejectment.

THE ABSTRACT

The result of the examination of the chain of title may be noted in the following form:

1. DEED

William J. Rose and Sarah, his wife, of Carlisle, Pa.	Dated Nov. 29, 1906.
	Recorded Dec. 28, 1906.
	Deed Bk. "B", Vol. 7, p. 462.
to	
Eastern Real Estate Company of Harrisburg, Pa., a Pa. Corporation.	Consideration: $4,000.
	Fee simple.
	Warranty: Gen.
	Ack: Nov. 29, 1906.

Description: Upper Allen Township, Cumberland County, Pa. Farm of 132 acres (here is inserted briefly the courses and distances, metes and bounds, etc.

2. WILL

Susan Rose, Lower Allen Township,	Died Sep. 3, 1905.
	Dated Sept. 27, 1887.
to	
William J. Rose	Probated Dec. 4, 1905.
	Will Bk. 29, page 63.
	Letters Test. to Wm. J. Rose.

".....I give, devise and bequeath all my estate, real and personal to my son, Wm. J. Rose, his heirs and assigns."

3. DEATH

John Rose, husband of Susan Rose, died Aug. 1, 1887.	(See Deed 1)

4. DESCENT

Henry M. Smith, of Lower Allen Township, to Susan (Smith) Rose.	Died Apr. 16, 1885. Letters Adm. May 5, 1885, to John Smith. Register's Dkt. 12, p. 25.

Only heir of intestate is a daughter, Susan, wife of John Rose, (Information as to heirs of Henry M. Smith received from Wm. J. Rose.)

5. DEED

S. J. Harris, Sheriff of Cumberland Co., as property of James Buck to Henry M. Smith.	U. S. Revenue Stamps $3. Dated Apr. 29, 1870. Recorded Apr. 29, 1870. Sheriff Deed Dkt. 2, p. 513. Deed Poll. Consideration: $2650. Ack. in open Court. Aug. 29, 1870.

Description: Same as deed 1 above.

6. JUDGMENT

James Smith vs James Buck.	Common Pleas of Cumberland County. No. 210 Feb. Term, 1870. Judgment entered on bond due Jan. 1, 1870. All waivers authorizing sale on fi. fa. Fi. fa No. 2 April Term, 1870.

(Conveyances 7 to 16, inclusive, are noted in same manner as the foregoing.)

17. DEED

John Penn, the Younger, by Anthony Butler, Attorney in fact: John Penn, the Elder, by John F. Mifflin, Attorney in fact to Robert White.	Dated Apr. 23, 1790. Recorded Jan. 3, 1792. Deed Book "K", Vol. 1, Page 54. Fee simple, subject to ground rent of 1 pepper corn per an. Con: 1510 L Warranty: Special Ack. Apr. 28, 1790.

Description: Allen Township, Cumberland County, Pa.

.... Lot No. 13, Containing 259 acres and 6 per cent for road, etc.

18. POWER OF ATTORNEY

John Penn, the Younger to Anthony Butler	Dated Apr. 29, 1788. Recorded Aug. 27, 1788. Deed Bk. "H", Vol. 1, Page 551. Ack. Apr. 30, 1788.

19. POWER OF ATTORNEY

John Penn, the Elder, to John F. Mifflin.	Dated Nov. 19, 1777. Recorded Aug. 27, 1785. Deed Bk. "H", Vol. 1, Page 548. Ack: Nov. 19, 1777.

Having completed the notes on the chain of title, the next task of the examiner is the search for liens and adverse interests as against the present and every former owner. The following form of tally or check list frequently used for this purpose will complete the record of the search.

THE CHECK LIST

NAME	MORTGAGES	JUDGMENTS	ADVERSE CON.	MISCL.	S. D.	T. D.
Eastern Real Estate Co. 29 Nov. 1906 to Date	X	X	8 C 572x 8 B 463x 8 B 450x	X	X	X
Wm. J. Rose 3 Sept. 1905 to 28 Dec. 1906	Bk. 66 page 155	X	7 B 462	X	X	X
Susan Rose 16 Apr. 1885 to 3 Sept. 1905	X	X	X	X	X	X
Henry M. Smith 29 Apr. 1870 to 16 Apr. 1885	Bk. P. page 249	X	X	X	X	X
James Buck 1 Apr. 1865 to 29 Apr. 1870	X	X	X	X	Dkt. 2 page 531	X

SEARCH FOR MORTGAGES. An examination of the "Mortgagor" indices in the Recorder's Office under the name of each owner named in the check list for the period that he held the title, and at least thirty days there after[49] (sixty days before 1915) will show the mortgages which might be liens. The entry of the word "satisfied" on the margin of the index is not the satisfaction. In every case the record of the mortgage itself should be consulted to ascertain if it has actually been satisfied. Under all circumstances search for mortgages should be made against all prior owners. The lapse of time does not satisfy a mortgage. A judicial sale does not ordinarily discharge the lien of a first mortgage.[50] Note all mortgages on the check list and check each as the record is examined so that none are overlooked.

SEARCH FOR JUDGMENTS. Search the judgment index in the Prothonotary's Office against the names of all persons owning the land during the last ten years. A judgment entered for purchase money before the purchaser receives his deed binds his equitable interest and, when he receives the deed, binds his whole interest, without revival, the moment the legal title is vested in him. Waters Appeal, 35 Pa. 523. Altho a judgment unrevived, is a lien for five years from the entry, the sci. fa. to revive may be issued on the last day of that period[51] and the judgment on the sci. fa. entered at any time within the following five years will continue the lien.[52] In case of title by descent or will it must be noted that all debts of the decedent are liens for the

[49]Act of May 28, 1915 P. L. 631. The holder of a purchase money mortgage has 30 days from execution in which to record it without loss of priority. Before this Act the time for recording was within 60 days from execution.

[50]Act of May 8, 1901, P. L. 141, Act of Apr. 6, 1830, P. L. 393, and amendments.

[51]Act of June 1, 1887, P. L. 289. See Uhler vs. Moses, 200 Pa. 498.

[52]Specht vs. Sipe, 15 Pa. Sup. 207.

period of one year from his death.[53] Judgments which were liens at the decedent's death are continued as such for the period of five years from that date.[54] Mechanics Liens[55] and municipal claims are indexed in the judgment index. Inquiry at the Prothonotary's office may disclose separate indices for municipal liens, tax liens, equity suits and ejectment suits, all of which must be consulted. In case a judgment appears by the index as a lien the original papers and the entries on the appearance docket should be examined for releases of the land in question from the lien of such judgment.

ADVERSE CONVEYANCES. Search the "Grantor" index of deeds in the Recorder's Office against all owners of the land during the period of their respective periods of ownership, and six months thereafter,[56] that is, from the date of the deed to each owner to a date six months after the recording of the deed out of him. Note on the check list opposite the name of each owner the book and page of each conveyance by him during the period of his ownership and then examine each deed so noted to ascertain that no owner conveyed the land prior to his conveyance to the succeeding owner in the chain of title. In case of a conveyance by an attorney in fact, executor, trustee or one in a representative capacity search both against the principal or decedent and against the agent or representative. Make this search against all owners for a search against the owners for a period of only thirty[57] or forty years[58] before the present date may not disclose easements and rights which were

[53]Sec. 15, Fiduciaries Act of 1917. Sec. 17 of this Act provides for the discharge of land from this lien before the expiration of the year by proceedings in the Orphans Court.

[54]Sec. 15, Fiduciaries Act of 1917.

[55]Sec. 43, Act of June 1, 1901, P. L. 431.

[56]By Act of May 19, 1893, P. L. 108, the Grantee has 90 days within which to record deeds acknowledged within the State and 6 months within which to record those acknowledged without the State.

[57]See note 3, supra.

[58]See note 3, supra.

created before that time and are still in existence. The examiner should satisfy himself that the land is not being held adversely to the owner of record and that it is not subject to any easement in third parties which do not appear on the record. If personal inspection of the premises by the examiner himself is not feasible careful inquiry should be resorted to.

In case an owner who has made numerous conveyances appears in the adverse search it will be found well worth the additional time expended for the examiner to make a separate brief of the conveyances by such owner, noting dates, place and time of recording, grantee and description of the property in each. The search for adverse conveyances is usually the most tiresome work of the examiner and an accurate brief of conveyances may save a reptition of this monotonous task.

MISCELLANEOUS RECORDS. In counties where a separate Miscellaneous Index is kept, make an adverse search in this index the same as in the case of the deed index, for powers of attorney to convey, agreements to sell land, grants of rights of way, easements, etc. In case a power of attorney to convey is discovered the name of the attorney or agent must be added to the check list for a period beginning with the date of commencement of his authority and ending with the conveyance out of his principal or the revocation of the authority. These records will be found in the Recorder's Office.

SHERIFF'S DEEDS. The index to Sheriff's deeds may be in the Prothonotary's office or in the Recorder's Office. Make a search in the "Grantor" Index to Sheriff's deeds the same as in the case of the search for adverse conveyances. In case a sheriff's deed appears in the chain of title it is important that the record of all

proceedings leading up to the sale be examined carefully and that the deed be "acknowledged in open Court."[59]

TREASURER'S DEEDS. The search for Treasurer's Deeds should be made in the index of such deeds, if any, in the Recorder's office and in the Office of the County Treasurer. In addition consult the list of returned taxes in the Treasurer's Office and in the County Commissioners Office[60] for the period beginning at least two years prior to the last treasurer's sale of land for taxes to ascertain whether the tract has been returned as unseated[61] or seated[62] for non payment of taxes. The laws relating to the county or city in question must always be consulted in matters of taxation and titles under tax sales.

TAXES. In addition to the examination of the list of returned taxes in the County Treasurer's Office, the "Tax Lien Docket" in the Prothonotary's office as well as the local collector's and the city treasurer's, in cities, should be consulted.[63] State taxes are a lien on the real estate of a corporation from the time of settlement by the Auditor General and approved by the State Treasurer. The purchaser from a corporation should therefore secure a certificate of tax liens from the Auditor General.[64]

[59]The acknowledgment of the sheriff's deed in open Court, followed by delivery, cures irregularities, but not a void sale. 2 Troubat and Haly Practice, 1779. Collins vs. Phillips, 236 Pa. 286. See Artcile by F. B. Sellers, Esq., in 19 Dickinson Law Review, 233.

[60]Act of May 21, 1915, P. L. 285, amended by Act of June 1, 1915, P. L. 650.

[61]Act of March 13, 1815, 6 Sm. L. 299, and supplements.

[62]Act of April 29, 1844, P. L. 486.

[63]Act of June 4, 1901, P. L. 264, provided for filing of tax liens in the Prothonotary's Office at any time before the end of the second calendar year after the tax becomes due." Sci. Fa. must issue within five years after filing lien. Act of March 1, 1917, P. L. 130.

[64]Act of June 15, 1911, P. L. 955. Lewis vs. Wyalusing L. H. & P. Co., 62 Pa. Sup. 282.

The abstract furnished the client consists of the notes of the exmaination reversed, the conveyance out of the Commonwealth, or the earliest conveyance on record, appearing as the first transfer on the abstract. Usually the abstract consists of the following in the order mentioned: description of tract; plot; earliest conveyance on record; then, in order of the time in which they were actually made, all other conveyances ending with that to the present owner. The check list is not properly a part of the abstract, the examiner replacing that by a certificate of the result of his search.

THE CERTIFICATE. The examination of the records has been complete only in so far as the indices of the records are complete. The records do not necessarily disclose the fact of adverse interests in third parties. The opinion of the examiner as to the validity of the title involves his opinion, in every instance, on a great many points of law. In view of the foregoing most attorneys prefer to certify to their clients that they have examined the indices of the records and that in their opinion, or belief, the title in fee simple is vested in the record owner.

JOHN E. MYERS.

MOOT COURT

CITY OF WHEELING'S APPEAL

Trusts and Trustees—Charitable Trusts—For the Benefits of the Poor—Equitable Conversion—Bequest of Land as Proceeds—Foreign Municipal Corporation as Trustee—Election To Reconvert

STATEMENT OF FACTS

X, in Pittsburgh, devised land in Pennsylvania to the executor to sell it, and pay the proceeds over to Wheeling to administer for the benefit of the poor of the city. The executor despite the expressed wish of the city, to elect to take the land instead of the proceeds, is about to sell it. This is a bill against the sale and to permit the city to take the land as land.

Lehmayer, for plaintiff.

Mashank, for defendant.

OPINION OF LOWER COURT

PERRY, J. Under the provision of this bequest, the property of the decedent was devised to the executor to be sold and the proceeds given to the City of Wheeling, to be distributed by them among the poor of the city. Although this is a highly indefinite description of the objects of the decedent's bounty, yet by the settled law of our state, there arises, under such provisions, an implied trust which being for the benefit of the poor, constitutes a public charity and will be upheld. Yaras Appeal, 64 Pa. 95; Wilman v. Lex, 17 S. & R. 88; Kimberley's Estate, 249 Pa. 469; In Re Dulles Estate, 218 Pa. 162.

Under the trust thus created the city thereby becomes the trustee subject to all the duties imposed upon other trustees namely, to fulfill and perform the duties and the commands imposed by the settlor of the trust.

And in the answering of any questions which may arise as to the construction of the testamentary provisions giving life to such relations, must therefor be governed by the law as it exists in the domicile of the donor, to wit the laws of this state. See the cases cited in 20 Annotated Cases 866.

Therefore to determine the nature and the quality of the interest held by the parties to this suit, we must perforce look to the laws of our state, governing the same. Upon an ex-

amination of these authorities, the court is led to the opinion that the nature of the interest held by the City of Wheeling, as trustee, is personalty rather than realty, an interest in the proceeds rather than an interest in the land itself. For, by the terms of the will, there is imposed upon the executor the express duty of selling the estate. This clause of the will of the testator is undoubtedly a positive and a pre-emptory order to sell and it cannot be questioned that it operated as a conversion of the residuary real estate into personalty efficaciously from the moment of the death of the testator. The intent of the testator appears to stamp the quality of personalty on the proceeds of the land, not only to subserve the purposes of the will, but also to define the rights of those who may claim thereunder. Miller v. Comm., 111 Pa. 321; Bergdolls Estate, 258 Pa. 108; McClaren's Estate, 238 Pa. 220; Williamson's Appeal, 153 Pa. 508.

The right of the testator to make his land, money, so as to affect his own purpose, is unquestionable and it follows that the persons claiming under the will directing the sale, must take in the character which the will imposes upon the property, to wit personally; equity regarding as done, that which was intended and should be done. Therefor whatever rights the parties, here seeking relief may have, the same are to be considered for all purposes as personalty; rights not in the realty itself, but rather in the proceeds which may be derived from the sale of the realty. 222 Pa. 208.

But in the petition filed, the petitioner asserts a right to elect to reconvert and seeks to enforce this right by taking the land as land and not as personalty, so intended by the donor. We are of the opinion that this assertion and alleged right cannot be upheld. While it is true that in the application of the doctrine of equitable conversion, it is well settled rule that if money be directed by a will or other instrument to be laid out in land, or land laid out in money, as in the present case, that the party beneficially interested may in either case, that the party beneficially interested may in either case, if he elects to do so, cause a reconversion of such property and take it in the original state, yet we consider the rule to have no application under the facts of this case as stated. Here the testator by explicit and commanding terms directed the proceeds and not the property to be given over to the city, and by them distributed for the benefit of the poor. And these directions must be obeyed, for to consider otherwise would be directly in the face of these positive terms, a violation of that cardinal principal of the Pennsylvania law, that the intent of the donor

shall prevail. To consider otherwise would be to allow the will of the trustee to thwart the will of the one who made the trusteeship possible.

Furthermore in our opinion, the City of Wheeling is not the proper party at law to make this election. As stated above the City is merely the trustee and the poor are those whom are vitally interested. It is though the latter alone that the privilege may be exercised. Under our laws an election to reconvert must be made in the nature of an unequivocable demand made by all those beneficially interested; not by one or a few, but by them as an entirety. Such a demand, to be honored must preserve the rights of all, and none be injuriously affected. Can we, as a court, allow this reconversion to take place and say that the rights of the poor will thereby be protected? We think not, but rather consider that the only manner allowed us in the protection of these rights of the poor, is by allowing the will of the donor to be exercised and not thwarted.

As a conclusion we state that the bill is brought, not by those vitally interested, but by the mere trustee, and we are of the opinion that the executor has full power to sell the realty as directed; that the election to reconvert has not been made by the proper party in interest, and that therefor the only right held by the petitioner is a personal right in the proceeds and not a right to the land itself, and we do hereby decree that the bill for an injunction to stay this sale be DISMISSED.

OPININON OF SUPREME COURT

That the giver of the proceeds of land could forbid the reconversion into land, is not to be doubted.

The gift here, is of the proceeds of land, to a trustee for an indefinite cestui que trust. That the thing given, is money is clear. Allowance of the option to take the land as land is made impracticable, because, (a) the trustee is not the beneficial owner of the money. It is trusted, not to administer land, but money. The administering of the land is given to the executor. (b) The City of Wheeling, a foreign municipal corporation, cannot hold, even as trustee land in Penna. If it can take the land instead of its proceeds, it can hold the land instead of its proceeds, it can hold the land indefinitely. (c) Only the persons entitled beneficially to the proceeds of the land can elect to have the courts reconvert the money into land. Handley's Estate, 253 Pa. 119.

The well considered opinion of the learned court below amply sustains the conclusion reached.

AFFIRMED.

MONIER v. STAPLES

Injury to Horse — Proximate Cause — There May Be Two Causes of the Same Event—Liability For Careless Act

STATEMENT OF FACTS

A fire engine drawn with great noise along the street of a town, frightened Monier's horse. The fear was subsiding so that Monier would not have lost control of him but for the discharge of a pack of fire crackers by Staples, very near to the horse. He became violently re-excited, ran off, broke the carriage, threw Monier out, and so seriously hurt himself that he had to be shot. Defence is that the fire engine caused the fright, and that Staple's act only protracted it and revived its intensity; that the crackers would not have caused fright had the horse not been already alarmed, that the crackers were only a remote cause of the injury, (if cause at all) the cause being the free acts of the horse.

Carothers, for Plaintiff.

Delesantro, for Defendant.

OPINION OF THE COURT

H. CLARK, J. The point upon which this case turns is, was Staple's act the proximate cause of the plaintiff's injury, or was it but a remote cause? If it be the proximate cause then Staples is liable to Monier in this action. If it be the remote cause then Staples is not liable to Monier for the injury done.

It is contended, and justly so, that Staples was negligent in discharging the fire crackers near the horse. His acts are within the definition of negligence, as given by Judge Cooley in his work on torts and cited in 29 Cyc., 415, i. e. "The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance, which the circumstances justly demand, whereby such other person suffers injury."

Conceding this, if Staples act was not the proximate cause of the injury to the plaintiff, he is not liable in this action. "The question as to what is the proximate cause of the injury

is ordinarily not one of science or legal knowledge but of fact for the jury to determine in view of the accompanying circumstances, all of which must be submitted to the jury, who must determine whether the original cause is by continuous operation, linked to each successive fact." 190 Pa. 122.

Marshall v. Lehigh Valley R. R. Co., 240 Pa. 272, is a case, governing this question. The facts in that case were, that the plaintiff's horse was frightened by steam escaping from an engine, not operated by the defendant. Plaintiff had quieted his horse and had him under control and he became re-frightened by the approach of a hand car propelled by the defendant's employees. The horse, as a result, ran away and caused the injury for which the suit was brought. The question in that case, being identical with the question in the case at bar, was whether the proximate cause of the accident was the escaping steam; in the case at bar, the fire engine, or the negligent operation of the hand car, in the present case, the act of Staples, was given to the jury.

The charge to the jury was, "if the injury was caused by the fright of the horse from Dolan's engine, here the fire engine, there could be no recovery against the defendant, but that if after being frightened by the steam escaping from the engine, here the fire engine, the horse was over the fright and under the control of the plaintiff and was, subsequently frightened by the negligent operation of the defendant's hand-car, in this case, the negligent act of Staples, the defendant would be liable." That this was the correct charge, see 33 Cyc. of Law and Procedure, 795, 797.

In 240 Pa. 272 supra, there was sufficient evidence to warrant the jury in finding that the horse was over the fright, caused by the escaping steam, and that it was under the control of the plaintiff and that therefore the defendant was liable in that action.

From the facts in the present case, i. e. "that Monier wouldn't have lost control of him," leads us to the conclusion that the fright occasioned by the fire engine had not subsided at the time of Staples act. 240 Pa.272 supra, has established the precedent by which we are to be governed in deciding this question in favor of the defendant.

OPINION OF SUPREME COURT

Staple's discharged fire crackers very near to the horse of Monier. This was a careless act. It might or might not

frighten the horse, but that it was apt to do so, is within general observation.

The effect of the explosion was in fact to frighten the horse. The fright led to the running off, the breaking of the carriage, the injury to Monier, and to the horse itself. We cannot well see, then, how the defendant is to escape responsibility.

There is a possibility that the fright occasioned by the fire engine left the horse susceptible of fear to an unusual degree. One state of mind may facilitate the getting into a second state. One shock makes the second shock the more easy. Had the question of the liability of those who operated the fire engine, for the disastrous results been before us, we might have found reason to hold them responsible, but that they contributed to the production of the excited state of the horse which eventuated in the accident, does not negative the defendant's responsibility for also causing it. There may be two causes of the same event. The engine's excitation of the horse is not incompatible with the defendant's co-operating excitation. Nothing in Marshall v. R. R. Co., 240 Pa. 272, is inconsistent.

It is necessary then that a new trial be had and the judgment of the learned court below is REVERSED.

DELANEY v. WHITE

Mortgage—Lessee's Right to Assignment Thereof—Subrogation of Lessee By An Assignment of the Mortgage by Mortgagee—Valuable Improvements—Irreparable Injury

STATEMENT OF FACTS

White had a mortgage on X's land for $4,000. Subject to this mortgage, X made a lease of the land for five years to Delaney at the rental of $600 per year, with the privilege of removing any buildings he might erect, and of repeating the lease for a further period of 10 years. He erected buildings costing $8000. Four years after the lease was made White issued a scire facias on the mortgage. Delaney then told White he would pay the mortgage, and tendered the money and demanded an assignment of the mortgage, White refus-

ing. This is a bill in equity to compel him to desist from selling the land and assign the mortgage.

Thomas, for Plaintiff.

Shapiro, for Defendant.

OPINION OF LOWER COURT

SHEAFFER, J. The salient question for decision in the case presented is: Can a lessee for years of a mortgagor, taking possession subject to the mortgage and erecting valuable improvements, secure relief by means of a bill in equity to compel the mortgagee to discontinue foreclosure proceedings and assign the mortgage to the complainant on the grounds of irreparable injury?

It is our opinion, from our understanding of the principles of equity and their application in the cases hereinafter reviewed that this question must be decided in the affirmative.

In Wundale v. Ellis, 212 Pa. 618, it was held that: Where a tenant has covenanted in his lease to pay the interest on an antecedent mortgage, and it appears that the lease has several years to run, and that the mortgaged premises have been so used in connection with other property that a severance would cause great injury, the tenant may, after a suit has been brought on the mortgage when no interest is due, tender the whole amount of the mortgage and demand an assignment thereof.

Again in Hopkins Manufacturing Co. v. Ketterer, 237 Pa. 285, in which the plaintiff asked for a bill to stay the writ and compel the assignment of a mortgage, it was held that the tender of payment to the mortgagee's attorney of record in the scire facias on the mortgage was all that was required to entitle the plaintiff to the relief he sought and to justify the court in granting it. Also, the same relief will be given under the same circumstances to a lessee for years.

Further, the whole right of the defendant, White, as holder of the mortgage is to have his money paid him, and his whole claim on the land is to hold it as security for such payment. When he was offered his money by the plaintiff, Delaney, his refusal to take it is persuasive evidence that he is not enforcing his legal rights in good faith but is seeking to use them for some ulterior and inequitable purpose. Even if this were untrue, the general doctrine of subrogation is that where a party can attain all his legal rights in either of two different ways, a court of equity will compel him to take that

which will do the least injury to another having a junior interest in the subject matter.

The learned counsel for the defense states that a mortgagee could not be compelled to assign the mortgage on payment, but only to surrender it. Also, he argues that the Act of June 24, 1885, P. L. 157, provides: in certain cases for the compulsory assignment of mortgages on tender of the amount due and that this Act does not cover the case of a lessee or tenant, and therefore that he is without a remedy. But these are Common Law remedies and even though it be conceded, which is by no means clear, that, ordinary cases must be brought within their terms, it does not follow that an equitable remedy should not be afforded when a case is presented to which equitable principles apply. The Common Law was opposed to assignments of choses in action, which it regarded as tending to litigiousness and maintenance: 2 Black Comm. 442. The general recognition and enforcement of assignments are the growth of modern methods of business and the development of equity founded on and following such methods: Bispham on Equity, Sec 164 (7th ed. 1905).

In conclusion, we find no solid reason why the principle of subrogation that, where a arty asserting a legal right can be fully secured in it, and at the same time the interests of another in the subject matter can be protected from impending injury, should not be applied in regard to the assignment of a mortgage in favor of a lessee, as well as to any other case to which the principle is applicable.

We therefore decree that the defendant, White, discontinue the foreclosure proceedings and assign the moertgage to the plaintiff, Delaney.

OPINION OF SUPREME COURT

A lessee may have such an interest in the demised land as will entitle him to tender to a mortgagee, the debt, and to demand an assignment of the mortgage. Wundale v. Ellis, 212 Pa. 618.

Delaney has taken a lease, which authorizes him after erecting improvements on the demised premises, to remove them at the expiration of the lease. If the mortgage is foreclosed, the purchaser will obtain the premises and the improvements will cease to be removable by the leasee; unless he should become the purchaser, and in competition with other bidders, he would have to pay not only the value of the land, but that of his improvements. He has, we think, abundant equity to

prevent a sale, if he offer to pay to the mortgagee, the entire debt. If he pays, he should be allowed to hold the mortgage against the lessor, in order to coerce repayment. A decree that he be subrogated to the mortgage would be proper.

This subrogation may be effected by an assignment of the mortgage, and we discover no appreciable reason for the court's refusal to compel such assignment. Wunderle v. Ellis, supra. Hopkins Manufacturing Co. v. Ketterer, 237 Pa. 285. It will cost the value of a sheet of paper, and of the ink expended upon its phraseology.

The able opinion of the learned court below vindicates its decision, the appeal from which must be, and is DISMISSED. MISSED.

BERGNER v. NEBENGER

Slander and Libel—Trespass For Libel—Privileged Defamation—Statements Made in Institution of Legal Proceedings

STATEMENT OF FACTS

Nebenger brought an action of trespass against Bergner for the value of a horse which he alleged that Bergner had stolen from him. Before the trial the horse was recovered and Nebenger suffered a non-suit. This is trespass for libel. The court charged the jury that "there could be no recovery whether the action for the value of the horse was brought in good faith or in bad; whether with or without malice."

Perry, for the Plaintiff.

Glowa, for the Defendant.

OPINION OF LOWER COURT

PHILLIPS, J. There is here involved a question upon which the courts of England had to decide many years ago; namely,—can a person accused of a crime, after it has been shown that he was innocent maintain an action of trespass for libel against the prosecutor? The weighty influence of those early decisions, augmented by the numerous subsequent opinions in accord, is very plainly evident in the decisions of our courts, even up to the very latest opinion in the Pennsylvania courts upon the subject, in the case of Kemper vs. Fort, 219 Pa. 85, answering the question in the negative.

In England, so far back as the time of Coke, anything said or written in legal proceedings was absolutely privileged. In Cutter v. Dixon, Cokes Reports, Part IV, at p. 14, it was ad-

judged that if action should be permitted in such cases, those who had just cause of complaint would not dare to complain for fear of infinite vexation, and in Buckley v. Wood, 4 Coke 14b; 3 L. R. A. 417, "it was resolved per totam curiam that for any matter contained in the bill that was examinable in the court, no action lies, although the matter is false, because it was in the course of justice."

In comparatively recent times, in Revis v. Smith, 86 E. C. L. R. 127, it was held that no action lies for a statement made, whether by affidavit or viva voce, in the course of a judicial proceeding, even though it be alleged to have been made "falsely and maliciously, and without any reasonable or probable cause." Defamatory matter relevant to the cause, published by a party to the cause, in the cause and to the Court and parties, is not actionable. If that were not so, every motion in this or any other court might furnish ground for action against somebody.

That case was followed by Henderson v. Droomhead, 4 H. & N. 569, and it was held that no action will lie for words spoken or written in the course of any judicial proceeding. The inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result if witnesses in courts of justice were not at liberty to speak freely, subject only to the animaversion of the court. Further see Seman v. Netherclift, L. R. L, C. P. Div. 540; Astley v. Young, 2 Burr, 807 and Johnson v. Evans, 3 Esp. 32.

Upon review of the English authorities, the rule, as deducted from them in Starkie on Slander and Libel, section 213, is that "no action, either for slander or libel, can be maintained against.....suitors, prosecutors.....for anything said or done, relative to the matter in hand, in the ordinary course of judicial proceeding and the regular course of procedure, even if it be false and malicious and without reasonable or probable cause." See also Sec. 196.

The law of France is also opposed to the maintenance of actions of this sort, by the Code de la Presse, Ch. 6, Art. 23. The majority of the Courts in this country have followed the English rule, that for any defamatory matter appearing in pleadings, no action can be maintained, the immunity being absolute. The Courts of New York, W. Va., Mass., and Ga. are still upholding the minority view, which is, after all nothing more than the English rule with a condition annexed. In Bartlett v. Christhill, 69 Md. 219, it is said "this privilege, protecting against a suit for libel or slander, is founded upon a

sound public policy which looks to the free and unfettered administration of justice, though as an incidental result it may in some instances, afford an immunity to the evil disposed and malignant slanderer." Pertinent and material matter written or spoken in judicial proceedings is privileged. Rainbow v. Benson, 71 Ia. 301, and in Runge v. Franklin, 72 Tex. 585, it is said "we believe it is, and ought to be the law, that proceedings in civil courts are absolutely privileged. Citizens ought to have the unqualified rights to appeal to the civil courts for redress without fear of being called to answer in damages for libel."

The law in Pennsylvania is set forth in Kemper v. Fort, supra, which holds that for false and malicious defamatory allegations appearing in pleadings filed in a court of proper jurisdiction, there is absolutely immunity from a suit for libel at the instance of the defamed party, when the defamatory words are relevant and pertinent to the matter or matters to be inquired into by the court. The authorities are, in the majority, uniform, that when the alleged libelous matter in proceedings is relevant and pertinent, there is no liability for uttering it. Public policy requires this even if at times the privilege of immunity for false and malicious averments in pleadings is abused. Justice can be administered only when the parties are permitted to plead freely in the courts, and to aver whatever ought to be known without fear of consequences if a material and pertinent averment should not be sustained. Wrong may at times be done to a defamed party for which the law provided no remedy, but the inconvenience of the individual must yield to a rule for the good of the general public.

We find no error in the charge of the trial judge to the jury.

Judgment for the defendant.

OPINION OF SUPERIOR COURT

Nebenger lost the possession of his horse and was led to suspect and partially, at least to believe that it had been previously taken by Bergner. Under the circumstances he had the right to bring suit for the recovery of the horse or of its value. He chose the action of trespass, but the horse having been returned to him, in some way, before the trial, he desisted from the suit, suffering a non-suit. This he was not required to do, for the return of the horse did not delete the trespass of taking it away and detaining it.

In his declaration, Nebenger stated the facts as he conceived them; that is, that Bergner had stolen the horse. This,

if untrue would have been libelous if stated in writing otherwise than in a judicial proceeding.

But, Nebenger was not bound to allow himself to be remediless if his horse had been taken by Bergner, or if he believed it had been taken by him. In any remedy, he had to make an allegation. The principle applies, that allegations made in pleadings are not actionable as libel, because untrue, because known to be untrue, because made with ill will towards the person accused. 1 Jaggard Torts, 527, 528; Kemper v. Fort, 219 Pa. 85, and authorities herein cited. We see no error in the instructions of the trial judge that the plaintiff could not recover, whether the action "was brought in good faith or in bad, with or without malice."

In Kemper v. Fort, supra, the court does not decide whether the words written must be relevant and pertinent to the matter to be inquired into, to escape the penalties of libel, if they are false and malicious, but the writer inclines to that view; 219 Pa. 85, p. 93, but that its falseness and maliciousness do not make it an actionable libel is distinctly asserted.

That the declaration in the trespass case was pertinent is indubitable. The plaintiff's hypothesis, on which his action was brought, was that Bergner had stolen the horse. Then the allegation of the theft was not irrelevant or impertinent.

Constrained then to reach the conclusion of the learned court below, we affirm its judgment. AFFIRMED.